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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

FRANCES DELATORRE,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA  
DEPARTMENT OF CORRECTIONS,

Defendant and Respondent.

F056669

(Super. Ct. No. 07C0150)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

Eric P. Escamilla, for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Steven M. Geverser, Supervising Deputy Attorney General, and Oliver R. Lewis, Deputy Attorney General, for Defendant and Respondent.

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\* Before Vartabedian, Acting P.J., Wiseman, J., and Poochigian, J.

Appellant Frances Delatorre appeals from the judgment entered after the trial court granted respondents' motion for summary judgment. She contends respondents' notice was one-day short of the 77 days required for service of a motion for summary judgment by overnight delivery and the trial court erred in attempting to remedy the inadequacy by continuing the motion for less than the requisite 75 days. We conclude that Delatorre waived the defective notice by filing an opposition to the motion and will affirm.

### **FACTS AND PROCEDURAL HISTORY**

Correctional officers at the Avenal State Prison overheard a telephone conversation between inmate Arturo Delatorre, his mother appellant Frances Delatorre, and another man. As a result, the correctional officers believed Mrs. Delatorre planned to smuggle contraband to her son in the prison and obtained a warrant to search her when she arrived at the prison. Despite Mrs. Delatorre's denials of wrongdoing, she was subjected to an eight-hour strip and body cavity search and forced to undergo x-rays of her "stomach and rectum." No contraband was found.

On March 5, 2007, Mrs. Delatorre filed a complaint against the State of California Department of Corrections and Officer Kirk D. Geringer (respondents) alleging violations of her federal and State civil rights, false arrest and imprisonment, negligence and negligent infliction of emotional distress. Respondents moved for summary judgment. The motion was served by overnight delivery on March 26, 2008,<sup>1</sup> and was set for hearing on June 10.

Delatorre filed opposition (separate statement, points and authorities, and declaration) to the motion one day before the hearing. She asserted the requisite 75-day notice was one day short and that triable issues of material fact existed to defeat summary judgment. She did not assert prejudice from the inadequate notice. At the hearing on the

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<sup>1</sup> All further references to dates of events are to dates in 2008.

motion, the court concluded the notice was one day short but, because Delatorre had filed opposition, the court saw no reason to reset the motion 75 days out. Delatorre's counsel responded by stating that he had no problem if the court vacated the trial date set for July 14 and permitted respondents to renote the motion. The court instead vacated the trial date and continued the hearing on the summary judgment motion for 34 days to permit respondents to file a reply to Delatorre's opposition.

At the continued hearing on July 14, Delatorre's counsel was unavailable because of a family medical emergency. The court granted his request to continue the motion until July 28. The motion was heard on July 28 and Delatorre reiterated her objection to the insufficient notice, but also opposed the motion on the merits.

The court granted summary judgment in favor of respondents finding that they were entitled to a judgment of dismissal on each cause of action of the complaint. On appeal, Delatorre challenges only the issue of inadequate notice.

## **DISCUSSION**

### ***Untimely Notice***

Notice of a motion for summary judgment must be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by overnight delivery, the required 75-day period is increased by two court days. (Code Civ. Proc., § 437c, subd. (a).) The notice period is computed by excluding the first day when service was effected and including the last day. (Code Civ. Proc., § 12.)

As indicated on the proof of service, respondents' motion for summary judgment was served by overnight delivery on March 26 and was set for hearing on June 10. June 10 is the 76th day after March 26, one day less than the required 77 days.

Respondents assert the documents were personally served on appellant's counsel's office on March 27. Delatorre therefore had the required 75 days notice for personal service. The filed proof of service, however, states the motion was served by overnight

courier on March 26, which triggered the 77-day notice required by the statute regardless of when the courier delivered the documents. (Code Civ. Proc § 437c, subd. (a).) Thus, the motion was not timely served.

Because the 76 day notice was invalid, the trial court had no authority to continue the hearing for less than the requisite notice period of 75 days for personal service. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1267-1268.) However, the trial court continued the motion rather than taking it off calendar because Delatorre had filed opposition. By doing so, the trial court, by implication, found that Delatorre had waived the notice defect.

***Appellant Waived the Untimely Notice***

We review the trial court's ruling on notice issues for abuse of discretion. (*Robinson v. Woods, supra*, 168 Cal.App.4th at p. 1261; *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 763.) We conclude the trial court did not abuse its discretion because the record supports an implicit finding that Delatorre waived the insufficient notice.

Respondents assert Delatorre waived the notice defect by (1) agreeing to the trial court's continuance of the June 10 hearing; (2) asking for a subsequent continuance; and (3) filing opposition and arguing the merits of the motion at the hearing. We agree with the third assertion.

Delatorre did not waive the inadequate notice by agreeing to a continuance of the June 10 hearing. A fair reading of the hearing transcript shows the court rejected Delatorre's argument that the motion must be renoticed anew. Delatorre merely acquiesced with the trial court's decision to continue the hearing to allow the respondents to file a reply brief and to accommodate vacation schedules. Nor did Delatorre waive the inadequate notice by requesting, through an attorney specially appearing for her counsel, to continue the hearing from July 14 to July 28 because of counsel's family emergency.

The only issue addressed at that hearing was the need to continue the matter because of the emergency. “Waiver of the right to the statutorily mandated minimum notice period for summary judgment hearings will not be inferred from silence.” (*Urshan v. Musicians’ Credit Union, supra*, 120 Cal.App.4th at p. 768.)

Delatorre waived the insufficient notice by filing opposition and arguing the motion on the merits. As a general rule, a party who appears and contests a motion in the court below may not seek relief in the appellate court on the grounds that the notice was insufficient or defective. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.) In such a case, the notice, albeit insufficient, has served its purpose. (*Ibid.*)

In *Carlton*, the appellant challenged the granting of summary judgment for the defendant in a legal malpractice action. He contended he was not properly served and did not receive sufficient notice of the hearing. (*Carlton v. Quint, supra*, 77 Cal.App.4th at pp. 693-694, 696.) The court disagreed and found, as a matter of fact, that he had received the requisite notice. (*Id.* at p. 696.) The court added, even if he had received inadequate notice, reversal was not required. Although he raised the issue of inadequate notice, he filed opposition to the motion for summary judgment eight days before the hearing and argued at the hearing. He did not request a continuance or contend he was prejudiced by inadequate notice. Under the circumstances, he waived any inadequate notice. (*Id.* at pp. 697-698.)

More recently, in *Robinson v. Woods, supra*, 168 Cal.App.4th 1258, the court analyzed recent case law addressing when the filing of an opposition waives defective notice in summary judgment motions. The court concluded that where inadequate notice is approved by the trial court through a case specific order or a local court order, opposition on the merits, in writing and at the hearing, does not waive the timeliness objection. In contrast, if untimely notice is attributable to a statutory violation by the moving party, the opposing party faces the dilemma of risking a loss on the motion if it

does not address the merits at all and the trial court declines to continue the hearing or, it addresses the merits to some extent, but does not adequately show prejudice due to the untimely notice. (*Id.* at pp. 1261-1267.)

The court's conclusion regarding the notice defect from the moving party's statutory violation was distilled from advice the *Carlton* court provided on the dilemma faced by an attorney who claims his client received inadequate notice of the summary judgment hearing. The court advised, if counsel is convinced his legal position is correct, he may appear at the hearing without filing a response to the motion and request a continuance for the purpose of preparing a proper response. If counsel makes a complete record relating to both the inadequate notice and the inability to prepare a proper response, and the court denies the continuance, the record will be preserved for any future writ proceeding or appeal. (*Carlton v. Quint, supra*, 77 Cal.App.4th at pp. 697-698.)

Alternatively, if counsel is unwilling to take the chance that the court could grant a continuance of the matter, he should file the best opposition possible under the circumstances. The opposition should challenge the inadequate notice, as well as the merits, and spell out why a more complete opposition could not be filed because of the untimely notice. Counsel should then appear at the hearing, object to the inadequate notice, explain the prejudice suffered from the inadequate notice, and request a continuance of the hearing so that a proper response to the motion may be filed. If the court denies the continuance, counsel should be prepared to argue the motion on the merits so that counsel has made an adequate record for an appeal. (*Ibid.*)

Applying the law in this case, the initial untimely notice was due to the moving party's error, so Delatorre fell into the latter group described in *Robinson*, and faced the dilemma of whether to respond on the merits. However, having done so, under *Robinson* and *Carlton*, Delatorre must establish prejudice from the untimely notice in preparing her opposition.

Delatorre did not ask to have the matter continued in order to file a more complete opposition. The initial continuance was granted to allow respondents to file a reply to Delatorre's filed opposition. Delatorre also did not assert that her ability to oppose the motion was prejudiced by the one-day-short notice. We note that Delatorre filed a supplemental declaration on July 9 through which she made additional challenges to the correctional officer's assertion of probable cause that she based on a transcript of the entire recorded phone conversation. On respondents' request at the hearing of the motion, the court struck the declaration as untimely.<sup>2</sup> Delatorre did not tie the late filed declaration to the untimely notice. Rather, counsel stated he received the tape recording of the phone conversation on July 2, several weeks after the original hearing date. He did not explain why he did not get the tape recording before that.

Accordingly, although Delatorre raised the issue of inadequate service in her opposition and at the hearing on the summary judgment motion, she nevertheless filed a complete response to the motion for summary judgment. Further, she did not assert she had inadequate time to prepare a response or was otherwise prejudiced by the one-day-short notice. Accordingly, the court did not abuse its discretion in finding, by implication, that she had waived her claim of inadequate notice.

### **DISPOSITION**

The judgment is affirmed.

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<sup>2</sup> In granting summary judgment for respondents, the court stated that even if it considered the supplemental declaration, the declaration did not negate the officer's good faith belief that drugs would be smuggled into the prison. Thus, he was immune from liability in this lawsuit.